

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARIN KEITH MARTIN	:	Case No. CR-1-02-105
	:	
Petitioner	:	
	:	(Sr. J. Spiegel)
vs.	:	
	:	UNITED STATES' RESPONSE
UNITED STATES OF AMERICA	:	TO DEFENDANT'S MOTION
	:	TO EXPAND RECORDS AND
	:	REQUEST FOR EVIDENTIARY
	:	<u>HEARING</u>
	:	
Respondent	:	

Comes now the Respondent, the United States of America, and respectfully submits its response to the Petitioner, Darin Keith Martin's motion made pursuant to 28 U.S.C. § 2255. The United States notes that this petition contains a request by the petitioner to expand the records and request for evidentiary hearing pursuant to Rules 7(b) and 8(b) of the rules governing § 2255 hearings. Petitioner alleges that his trial counsel was deficient in failing to perfect an appeal as instructed. This alleged failure, petitioner contends, deprived him of both his constitutional and statutory rights to an appeal of his sentence which he has described as "erroneous and unlawful."

In expanding the record, petitioner seeks to submit a letter he received from Assistant Federal Public Defender, C. Ransom Hudson, dated October 19, 2005. In the letter, Mr. Hudson advises petitioner that the attorney-client privilege may be deemed to be waived based upon the filing of a post-conviction challenge pursuant to 28 U.S.C. § 2255. Mr. Hudson asked the petitioner whether he had any objection to an affidavit

being submitted to the Court. He advised that he may eventually be required to testify at a deposition or hearing about the issue regarding the filing of a notice of appeal. In conclusion, Mr. Hudson solicited the petitioner's opinion on the matter and expressed a willingness to submit a prompt response to the District Court. The petitioner has not responded to Mr. Hudson's letter.

Argument

Because petitioner asserts in his federal habeas corpus petition that he was denied the effective assistance of counsel, he has implicitly waived his attorney-client privilege as it relates to such claim. In re Lott, 424 F.3d 446, 452-454 (6th Cir. 2005). Other Circuits have also found the existence of an implied waiver of the attorney-client privilege when the petitioner injects into the litigation an issue that requires testimony from its attorneys, or testimony concerning the reasonableness of its attorneys' conduct. Johnson v. Alabama, 256 F.3d 1156, 1178 (11th Cir. 2001). See also; Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003) (Privilege deemed waived when petitioner alleged that his attorney provided ineffective assistance of counsel in their choice of a defense strategy), Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974) (Privilege waived once client calls into public question the competence of his attorney).

It is apparent, that petitioner has not responded to trial counsel's request. It is unclear, however, whether petitioner is seeking to prohibit the submission of an affidavit by trial counsel thereby affirming the existence of the attorney-client privilege. His continued refusal to respond to trial counsel's request would seem to have that effect. The petitioner cannot hide behind the privilege if he is relying upon privileged communications to make his case. Petitioner can not use the attorney-client privilege

as both a shield and a sword. United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991). See also Mason v. Mitchell, 293 F.Supp.2d 819, 823-24 (N.D. Ohio 2003).

Conclusion

For all the aforementioned reasons, we respectfully request that defendant's Motion to Expand the Records and Request for Evidentiary Hearing should be held in abeyance pending petitioner's written submission of his attorney-client privilege.

Respectfully submitted,

GREGORY G. LOCKHART
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon Darin Keith Martin, #03606-061, FCI - McKean, P.O. Box 8000, Bradford, Pennsylvania 16701, by regular U.S. Mail, on the 16th day of December, 2005.

s/ Anthony Springer
ANTHONY SPRINGER (#0067716)